table principles, though the case does not come within the language of the statute." (Italics ours.)

In the case at bar petitioner has pointed out in his main brief that there is no special equity in favor of respondents to be subserved by permitting the set-off here sought, but on the contrary there are many superior equities in favor of third parties (other depositors of the bank) which would be injured if the set-off were to be permitted.

This Honorable Court rejected what was represented to be the Pennsylvania rule of set-off in *Gray* v. *Rollo,* 18 Wall. 629, but in so doing Mr. Justice Bradley said, at page 632:

> "In that State (Pennsylvania) under the decisions there *it is probable* that set-off would be allowed in such a case as this." (Matter in parentheses and italics ours.)

Indicating by the use of the words "it is probable" that this court was not certain that the Pennsylvania decisions would permit set-off of a separate demand against a joint debt in every situation.

The comparatively recent decision (1918) of the Pennsylvania Supreme Court in *Mintz* v. *Tri-County Natural Gas Company,* 259 Pa. 477, 103 At. 285, (cited in respondents' brief, page 22) recognizes the substantial difference between joint, several, and joint and several obligations and also recognizes the general doctrine that joint demands cannot be set off against separate claims. The court took particular pains in the Mintz case to point out that in the Childerston, Stewart, and Cochran cases (discussed on pages 22-24 of respondents' brief) no harm resulted from an agreement of the joint obligors to an adjustment of the proceeds of set-off, thereby inferring, petitioner respectfully submits, that if any harm would have resulted from the agreement of the joint obligors to the set-offs, they would have been denied by the Pennsylvania Courts. (See further discussion of this case, *infra,* p. 6.)

3. Even if the Partnership Obligations Are Joint and Several, Set-off Would Not Be Proper in this Case.

The respondents lay much stress upon the contention that, under the law of Pennsylvania, there is no practical distinction to be drawn between a "joint" and a "joint and several" obligation, and allege that if the bank had brought an action against the partnership on these notes, it could claim in execution the assets of the individual partners. Respondents then state that upon suit against the bank by the individual partners for their individual deposits, the judgments would be in all respects mutual for the purpose of off-set, and that this procedure is barred in this case by the bank's insolvency.

Petitioner submits that it is a fundamental rule of law, upon obtaining judgment against a partnership, or its members as such, that execution must first go to the joint assets of the partnership for satisfaction, in so far as such assets may respond, and that only thereafter do the partners become individually or personally liable for the deficiency. A careful examination of the Pennsylvania statutes cited by respondents discloses no provisions to the contrary, and there are no cases of Pennsylvania or of any other state cited by respondents as authority therefor. Furthermore, there is no showing of insolvency of the partnership, and for the purpose of decision in this case, it must be assumed that the partnership was solvent at the time of its dissolution, which, as a matter of fact, it was. (Respondents' brief, p. 13.)

Our understanding of respondents' contention in this connection is: that if a judgment had been obtained by the bank against the partnership, then substantial mutuality would come into being for the purpose of set-off. Conceding for discussion only that respondents' contention in this respect would be correct if the bank had not failed, petitioner submits that the mutuality contended for does not now exist because no judgment has been obtained against

the partnership and if judgment were to be obtained hereafter such mutuality would come into being after the suspension of the bank and therefore set-off would not be available. See discussion, *infra*, pp. 9-10, of *Hulse* v. *Knapp*, 20 Fed. Supp. 137, 138. See also *U. S. F. & G. Co.* v. *Wooldridge* (C. C. A. 5), 295 Fed. 847, 849, affirmed 268 U. S. 234; *McCandless* v. *Dyar* (D. C. S. D.), 34 Fed. (2d) 989; *Dickens* v. *Howard* (C. C. A. 5), 67 Fed. (2d) 263.

In the decision of the Pennsylvania Supreme Court in *Mintz* v. *Tri-County Natural Gas Co.*, 259 Pa. 477; 103 At. 285 (cited in respondents' brief, page 24), the court, while reiterating the principle that a joint debt cannot be set off against a several debt, also indicates at page 286 the circumstances under which the Pennsylvania authorities will grant a set-off of joint obligations against several or individual claims of the obligors:

> "Since the defendant cannot maintain a suit against the present plaintiff alone, for the breach of contract which it contends it has a right to take advantage of in this action, it follows that the defendant is not in a position to use this alleged breach in defense as a set-off; for the rule requiring mutuality of debts, where set-off is pleaded, forbids the setting off of a joint debt against a separate one. 34 Cyc. 712, 727, 730. 'Mutuality of debts is the essential circumstance in set-off.' Cramond et al., Ex'rs, v. Bank of United States, 1 Bin. 64, 69; McDowell v. Tyson, 14 Serg. & R. 300; see, also, Milliken & Co. v. Gardner, 37 Pa. 456; Schlacher v. Bergdoll, 41 Pa. Super. Ct. 547, 550, 551; and, on the general subject involved, Hibert v. Lang, 165 Pa. 439, 30 At. 1004.
>
> "The cases which hold that two or more persons sued jointly may set off a debt due by the plaintiff to any one of them (Childerston v. Hammon, 9 Serg. & R. 68; Stewart v. Coulter, 12 Serg. & R. 252, 14 Am. Dec. 680; Cochran v. Cutter, 18 Pa. Super. Ct. 282) have no application here, since they rest upon the theory that defendants have the right to agree among themselves as to the adjustment of the proceeds of the set-off, and hence no *harm* is done to any one. This rule

> also permits one of two joint obligees, with the consent of the other, to use the obligation as an equitable defense in an action by the obligor against one of them alone (Smith & Co. v. Myler & Aber, 22 Pa. 36; Cochran v. Cutter, supra) for, again, no *harm* is done; * * *." (Italics inserted.)

The "harm" in allowing the set-off in the case at bar would be done to the other depositors and creditors of the bank in that the partnership assets which are dedicated to the payment of the partnership debt to the bank would be made available to the respondents only rather than to all of the other depositors and creditors of the bank. Furthermore, respondent Binenstock would be entitled to contribution from the estate of the deceased partner Swinger as pointed out in petitioner's main brief (pages 22-24).

While respondents state that there is no practical distinction in Pennsylvania between a joint obligation and a joint and several obligation, yet all of the statutes and decisions relied upon for this proposition are conceded by respondents to be remedial only, see page 11 of respondents' brief wherein the following statement is made:

> "Even if there were no State statutes the difference between a joint and joint and several obligation has been purely one of procedure except in so far as acts in the nature of a release were indulged in."

See also quotation appearing on page 9 of respondents' brief from *Miller* v. *Reed*, 27 Pa. 244, reading in part as follows:

> "The distinction always had regard to remedies."

It is petitioner's position that set-off as applied to insolvent national banks is a matter of substance and not form nor procedure (petitioner's main brief, pages 8-12).

Respondents at page 12 of their brief state:

> "Petitioner would seem to admit by very clear inference that if the liability of the partners constituting the

firm of Swinger and Binenstock on the notes here in question were both joint and several, the set-off requested would surely be allowed."

Petitioner concedes for discussion only that *at law* a separate demand may be set off against a joint and several demand. The instant case, however, is not an action at law but rather is a suit in equity, and therefore the rules of equity rather than the rules of law will control.

A court of equity will not look to the form of the obligation, *Scott* v. *Armstrong*, 146 U. S. 499; *Building and Engineering Co.* v. *Northern Bank*, (N.Y.) 90 N. E. 1044; *Barrington* v. *Maner*, 54 Fed. (2d) 917, but rather will examine into the facts to determine who is the real and ultimate obligor, *Shannon* v. *Sutherland*, (C. C. A. 4) 74 Fed. (2d) 530; *Building and Engineering Co.* v. *Northern Bank, supra; Barrington* v. *Maner, supra.*

Consideration of applicable law in this case reveals that the partnership assets constitute the primary fund out of which the partnership debts must be paid (See petitioner's brief, page 17) and the position of the individual respondents is in equity analogous to sureties or endorsers. (See cases petitioner's brief, pages 25-26.)

4. Mutual Credit Doctrine Relied Upon by Respondents Not Applicable Here.

Respondents' brief. (Pages 13, 14) places considerable reliance and stress upon the supposition that the bank extended credit to the partnership in reliance upon an agreement, either express or implied, that the deposit accounts of the respective partners could be used to apply on or extinguish the partnership debt. Respondents, however, failed to point out wherein that doctrine, sometimes called the "mutual credit" doctrine (*Scott* v. *Armstrong*, 146 U. S. 499, 507) applies.

Petitioner respectfully submits that the mutual credit doctrine is of no avail to the respondents here because there

is no allegation in the bill of complaint nor elsewhere in the record of this case that any agreement, express or implied, existed between the parties which would enable the bank to appropriate or apply the individual deposit accounts of the respondents on the partnership debts.

Certainly the great weight of authority supports the view that a bank cannot apply an individual deposit to the payment of a debt owing to it by a firm of which the depositor is a member. See Michie on Banks and Banking, Volume 5, page 276; 3 R. C. L. 591; 7 C. J. 659. Since the bank could not have appropriated the individual deposits of respondents to apply on the partnership debt *before* the bank suspended business it *cannot be said* that the bank had a *greater right after* it closed. Inasmuch as the bank could not appropriate the deposit accounts of the individual partners, a harmonious ruling requires that the respondents as individuals cannot appropriate the partnership debt for application on their deposit accounts. In other words, there must be mutuality of right.

5. Recent Set-off Decisions.

Subsequent to the filing of the main briefs by petitioner and respondents, two decisions of United States District Courts have been reported which support the position of petitioner in this case.

Hulse v. *Knapp* (D. C., W.D., N.Y.) 20 Fed. Supp. 137.

In that case suit was brought by Hulse, as receiver of a national bank, against Knapp, individually, on a $500 note. The Knapp Drug Company, a co-partnership, had a deposit account of $2,582.66 in the bank. The defendant, being a partner owning a one-half interest in the firm, sought, with the consent of his co-partner, by the filing of an equitable defense plea, to set-off his individual liability on the $500 note against a like amount of the firm's deposit account.

District Judge Knight denied the set-off for these reasons, inter alia:

(a) The debts do not run solely between the same parties.

(b) Joint demands may not be set off against separate demands.

(c) Bank could not apply individual deposit to satisfaction of partnership debt. Therefore, an harmonious ruling requires that the partnership cannot set off its deposit account against the individual debt.

(d) The allowance of set-off would violate the equitable distribution mandate of the National Bank Act by giving the firm as depositor a preference over other creditors.

(e) Set-off must be determined in the light of the National Bank Act.

(f) Mutuality by virtue of consent of co-partners was created after suspension. Therefore, allowance of set-off would violate the rule requiring mutuality at suspension.

In the case at bar mutuality on the theory advocated by respondents would only come into being after judgment had been obtained against the partnership and since no judgment has been obtained no mutuality now exists. Even if judgment were later to be obtained the mutuality would come into existence after the suspension of the bank and therefore set-off would not be available.

Petitioner further submits that the reasoning employed and the result reached by District Judge Knight in the Knapp case in all respects supports our position and contention in the instant case.

Kardon v. *Willing* (D.C., E.D., Pa.) 20 Fed. Supp. 471.

Kardon, as trustee for his son, created and maintained a deposit account in the Sixth National Bank of Philadelphia. This account had a balance of $11,268.75 at the date of sus-

pension of the bank. Kardon was endorser on notes totalling $7,603.20. Makers of notes totalling $7,328.20 were unable to pay. After the bank closed Kardon revoked the trust for his son and sought to set off his liability as endorser on the notes against a like amount of the deposit account carried in trust for his son. In denying the set-off District Judge Maris said:

> "There is no doubt as to the right of a depositor in a closed bank to set off the amount of his deposit against his liability as endorser upon a note held by the bank *provided the maker of the note is insolvent.*" (Italics ours.)

This reasoning clearly supports the petitioner's contention that the firm of Swinger and Binenstock could not have set-off the firm deposit against the endorsement liability of the partnership on the Cammarota note; a fortiori, the individual members of the partnership cannot set off their separate deposit accounts against that endorsement liability.

It is respectfully submitted that the decision of the courts below should be reversed.

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